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No. 00-852

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2000

DOUGLAS L. PATCH, BRUCE B. ELLSWORTH, and SUSAN S. GEIGER

Petitioners,

v.

CONNECTICUT VALLEY ELECTRIC COMPANY and CENTRAL VERMONT PUBLIC SERVICE CORPORATION,

Respondents.

ON PETITION FOR WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER'S REPLY TO THE BRIEF IN OPPOSITION

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I. INTRODUCTION

In the Petition for Writ of *Certiorari* (the "Petition"), the New Hampshire Public Utilities Commission ("NHPUC") demonstrated why the holding of the First Circuit in *Patch VIII*[1] created a conflict in the Circuit Courts of Appeal on an important jurisdictional issue compelling Supreme Court review. Rather than address those arguments in its Brief in Opposition, Respondent Connecticut Valley Electric Company ("CVEC" or "Connecticut Valley") misrepresents the record facts and mischaracterizes the proceedings below in an effort to transform the rationale of the First Circuit into something it finds preferable to the First Circuit's actual holding. By mischaracterizing the First Circuit's ruling, CVEC apparently believes it can deflect the Supreme Court's attention away from the First Circuit's serious departure from well settled jurisprudence under the Johnson Act, 28 U.S.C. § 1342, a departure that compels review and reversal by this Court.

With the possible exception of an increase in its rhetorical zeal, CVEC's tactic of misrepresentation of NHPUC orders and the breadth of favorable court rulings is typical of its advocacy in the proceedings below. Court rulings are not immune from CVEC's obvious overreaching.

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[1] The prior case shorthand utilized in the Petition for Writ of Certiorari is continued herein. *Public Serv. Co. of New Hampshire v. Patch*, 962 F. Supp. 222 (D.N.H. 1997) (*Patch I*); *Public Serv. Co. of New Hampshire v. Patch*, 173 F.R.D. 17 (D.N.H. 1997) (*Patch II*); *Public Serv. Co. of New Hampshire v. Patch*, 136 F.3d 197 (1st Cir. 1998) (*Patch III*); *Public Serv. Co. of New Hampshire v. Patch*, 167 F.3d 15 (1st Cir. 1998) (*Patch IV*); *Public Serv. Co. of New Hampshire v. Patch*, 167 F.3d 29 (1st Cir. 1998) (*Patch V*), *cert. denied*, 526 U.S. 1066 (1999); *Public Serv. Co. of New Hampshire v. Patch*, 202 F.3d 29 (1st Cir. 2000) (*Patch VI*); *Public Serv. Co. of New Hampshire v. Patch*, 87 F.Supp.2d 57 (D.N.H. 2000) (*Patch VII*); *Public Serv. Co. of New Hampshire v. Patch*, 221 F.3d.198 (1st Cir. 2000), *Patch VIII*.

For example, CVEC was rightfully chastised by the First Circuit in *Patch VI*, where the court stated:

> In its brief and at oral argument, Connecticut Valley made clear that it thinks that the district court has assured the company *pendente lite* of its right to collect "its costs," a goal frustrated in part by this court's supposed failure to understand that cost recovery is the status quo that the district court has sought to preserve. However, what *Patch IV* and *V* sought to make clear is that no such assurance is valid; the district court's injunctive relief was sustained only against orders implementing the restructuring plan. If injunctive relief is to extend beyond such orders, it must be independently justified.

Patch VI, 202 F.3d at 33; Appendix to Petition for Writ of Certiorari at 63-64 (hereinafter "Pet. App. at ___").

The pattern of overreaching and mischaracterization in an effort to obtain its preferred result continues in CVEC's Brief in Opposition. All of the supposed counter-arguments raised in CVEC's Brief in Opposition rest upon a single, demonstrably false, premise – that the NHPUC ordered CVEC to continue purchases under the wholesale power contract with its parent (the "RS-2 Contract") approved by the Federal Energy Regulatory Commission ("FERC"). Once Connecticut Valley's false premise is exposed for what it is, it is clear that Connecticut Valley has no argument in opposition to those raised by the NHPUC in the Petition. Accordingly, as demonstrated in the Petition, the question presented is substantial, and the ruling of the First Circuit in *Patch VIII* has created a conflict between the Circuit Courts of Appeal on that substantial question warranting Supreme Court review.

II. ARGUMENT

A. CVEC's Characterization of NHPUC Orders and the Proceedings Below Is Demonstrably Wrong, Making All Of Its Arguments Fallacious.

1. CVEC mischaracterizes NHPUC's orders and the opinions below.

CVEC's Brief in Opposition attempts to depict a "trapping" situation by mischaracterizing two NHPUC orders. CVEC brazenly asserts on page after page that NHPUC has created a conflict with federal law by, in one order, disallowing certain claimed cost increases for purchases under the RS-2 Contract and simultaneously requiring CVEC to continue making purchases under the same RS-2 Contract by another order. Only half of this characterization is true. The NHPUC has disallowed certain cost increases on the grounds that CVEC acted imprudently in incurring them when less expensive alternatives were available. Order No. 22,815; Pet. App. at 109, the "Disallowance Order". However, the NHPUC has never mandated that CVEC make any purchases under the RS-2 Contract, nor has it forbidden CVEC from exercising its contractual right to terminate the contract. Nevertheless, in at least eight instances, CVEC's Opposition baselessly claims that the NHPUC has prohibited CVEC from terminating the RS-2 Contract. Curiously, after each recitation that "NHPUC ordered" continued purchases or that "NHPUC ordered" CVEC not to terminate purchases under the RS-2 Contract, CVEC fails to provide any citation to any NHPUC order supporting its characterization. The reason for CVEC's omission is simple; the characterization is untrue and there is no language in any NHPUC order compelling such purchases or prohibiting termination. [2]

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[2] CVEC's mantra begins early with the "Question Actually Presented" where it states "[NHPUC] having ordered a utility not to terminate

After misrepresenting the NHPUC's orders regarding CVEC, the company then argues that the misrepresented facts are the basis of the First Circuit's decision. However, the First Circuit's opinion made it clear that it was not based on CVEC's claim that the NHPUC had prohibited it from terminating the RS-2 Contract. The First Circuit specifically held:

The lack of an affirmative order is irrelevant:

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wholesale power purchase" and continues in the paragraph below where CVEC states "The Petition misstates the question presented by ignoring the fact that the New Hampshire Public Utilities Commission ordered Respondent Connecticut Valley Electric Company to continue making wholesale power purchases from its parent. . ." Brief of Respondent in Opposition at i (hereinafter Brief in Opp. at ___). The mischaracterizations continue on page 2 where CVEC states. . . ". . . and instead required Connecticut Valley to continue making such wholesale power purchases under RS-2." Brief in Opp. at 2. Connecticut Valley's bold headings are not immune from misrepresentation. "The NHPUC's Direction to Connecticut Valley Not To Terminate The RS-2 Rate Schedule. Brief in Opp. at 9. Slightly less emphatically "through its switch in position on termination, the NHPUC sought to compel Connecticut Valley to continue to purchase its RS-2 wholesale power requirements. . ." Brief in Opp. at 10-11. The misstatements of the First Circuit's holdings begin on page 14 where Connecticut Valley prefaces a correct quotation from the First Circuit with "the First Circuit affirmed, holding that the NHPUC's July 22, 1998 order directing Connecticut Valley not to terminate RS-2 had eliminated the NHUPC's grounds for finding Connecticut Valley's RS-2 purchases to be imprudent. . . Brief in Opp. at 14. Of course, neither that language nor its equivalent is found anywhere in the First Circuit's opinion. The misrepresentations continue with "The NHPUC cannot have it both ways by requiring Connecticut Valley to continue purchasing under RS-2 but denying full recovery. . ." Brief in Opp. at 23. "NHPUC. . .could not order Connecticut Valley to continue its RS-2 wholesale power purchasers. . . Brief in Opp. at 24. As noted above, all of these statements are patently false as NHPUC has never ordered CVEC to continue purchases under the RS-2 Contract or not to terminate the RS-2 Contract. See generally, NHPUC Order 22,986, Pet. App. at 68-73.

> the RS-2 Contract requiring purchase is binding on Connecticut Valley unless terminated; termination now apparently would be self-defeating because it would give rise to this prospect of a potentially heavy financial penalty that the state commission does not want.

Patch VIII, 221 F.3d at 202-203; Pet. App. 9-10 (emphasis added). This is the First Circuit's holding. It found the provisions of the NHPUC Order No. 22,986 (the "Vacation Order"), Pet. App. At 68-73, to be "irrelevant", and certainly not controlling of the issues presented to it on appeal. What it found to be important and controlling was its assumption that contract termination would be "self-defeating", presumably because of the potential costs associated with that termination in the form of an exit fee that FERC might allow. However, CVEC has never attempted to terminate its purchases from its parent nor shown that the cost of a termination fee would be higher than the savings from power purchases outside the contract. Such evidence, were it available, would presumably be adduced by CVEC to the NHPUC to demonstrate their prudence.

Thus, the First Circuit substituted its judgment, based on assumed facts, for the judgment of the NHPUC, leading that court to the conclusion that termination now, "apparently would be self-defeating because it would give rise to the prospect of a potentially heavy financial penalty that the state commission does not want." *Patch VIII*, *supra*; Pet. App. 9-10. That is where the First Circuit erred. The First Circuit lacks jurisdiction to enjoin a lawful state rate order based on what it perceives as an "evaporated" rationale for that order. *See Kentucky W. Va. Gas Co. v. Pennsylvania Pub. Util. Comm'n*, 837 F. 2d 600 (3rd Cir.), *cert. denied*, 488 U.S. 941 (1988). As detailed in the Petition, the Johnson Act limits the federal court's role to the determination of whether a

particular power purchase is required under federal law thereby creating a conflict between the state Disallowance Order and federal law. Without such a conflict, federal courts have no jurisdiction to enjoin the NHPUC.

2. NHPUC's Order No. 22,986 does not require that CVEC continue to make power purchases from its parent under the RS-2 Contract.

Despite CVEC's many misrepresentations to the contrary, nothing in the Vacation Order requires CVEC to continue to purchase power under the RS-2 Contract. See, Pet. App. 68-33. Likewise, nothing in the Vacation Order prohibits CVEC from exercising its contractual right to terminate the RS-2 Contract. *Id.* As noted in detail above, CVEC fails to cite to any language in the Vacation Order to support its characterization.

In reality, as can be seen from a review of the actual language of the Vacation Order and as is even more apparent when the context of the Order is considered, Order 22,986 simply removed the affirmative obligation to issue notice of termination of wholesale "requirements" contracts that NHPUC had previously ordered be given by three New Hampshire utilities with such contracts. The orders to terminate were issued as part of New Hampshire's plan to implement electric utility restructuring.[3] The orders were

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[3] Under New Hampshire's electric utility restructuring legislation, distribution and supply functions are separated. Electricity is sold by suppliers at unregulated, competitive prices with consumers free to choose their supplier. Distribution companies, like CVEC, continue to charge regulated, cost of service rates for the use of their distribution system. The Order to CVEC to terminate its RS-2 Contract was among other orders to terminate supply contracts in preparation for the commencement of competition. See generally, N.H. Rev. Stat. Ann. 374-F (1996).

based on the expectation that CVEC, and the other two utilities, would no longer need to purchase any power at all after the start of competition. The wholesale requirements contracts that existed between suppliers and the three New Hampshire utilities contained provisions permitting the contracts to be terminated upon specified notice periods. The NHPUC ordered the three utilities to exercise their termination rights in order to mitigate the amount of costs "stranded" as a result of a move toward deregulation.[4] The orders to terminate were thus unrelated to any consideration of whether any of the utilities had been imprudent in continuing to purchase under their supply contracts when less costly alternatives were available. On the contrary, the orders were premised on the expectation that the utilities would no longer purchase power for resale from any source.

Subsequent to its orders to the three utilities to give notice of termination of their wholesale requirements contracts, FERC rendered a decision which made it clear that termination of a wholesale requirements contract, like the RS-2 Contract, was probably unnecessary to mitigate stranded costs, since after restructuring the purchasing utility would simply have no requirements. *Id.* Pet. App. at 70-71. Accordingly, in the Vacation Order, the NHPUC vacated its directive to CVEC, and the two other New Hampshire utilities, to give notice of termination of their requirements contracts, because termination was no longer necessary to mitigate stranded costs.

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[4] CVEC had refused to comply with NHPUC's lawful order to provide notice of termination. Despite its refusal, CVEC was not found imprudent for disobeying the NHPUC's order but was found imprudent for not adhering to its state law obligation to pursue the least cost power supplies available. See Order 22,815, Pet. App. at 109; *Appeal of Sinclair Machine Products, Inc.*, 126 N.H. 822, 834, 498 A.2d 696, 705 (1985) ("The wholesale rate must be justified by the utility as the product of reasonable efforts to secure the lowest cost in light of appropriate alternatives available to the company.")

After issuance of the Vacation Order, the decision to terminate or not to terminate the RS-2 Contract rested solely with CVEC. Thus, the Vacation Order merely returned CVEC to the *status quo ante*, with the decision to continue making the purchases it needs prior to competition, or to cease those purchases, a matter of CVEC's prudence. Connecticut Valley has consistently chosen not to terminate the contract in the face of the Disallowance Order entered in December 1997. Pet. App. at 109.

Separate and apart from the fact that the Vacation Order fails to contain the prohibition on termination alleged by CVEC, Connecticut Valley's construction of the Vacation Order and its impact on the First Circuit's holding is nonsensical. The Vacation Order does not command CVEC to do anything. More importantly, to the extent CVEC persists in its mischaracterization of the Vacation Order and its effect on the First Circuit's rationale, NHPUC can simply rescind the Order eliminating what CVEC regards as the First Circuit's linchpin and the underpinnings of CVEC's entire argument in opposition to the Petition. Obviously, the First Circuit did not rest its opinion on such shaky ground. CVEC also fails to explain why the Vacation Order, which was in full force and effect and brought to the attention of the First Circuit prior to its ruling in *Patch V* (overturning the district court injunction of the Disallowance Order) did not control the First Circuit determination in that appeal. Clearly, the First Circuit's opinion hinges on what it perceives to be the wisdom of the Disallowance Order and NHPUC's concomitant imprudence finding, and is impermissibly based on the First Circuit's assumption of the costs of relevant alternatives.

As noted above, the Vacation Order had no effect on the First Circuit's holding; in fact it found it to be irrelevant. Its decision focused on termination of the RS-2 Contract and its unjustified assumption that termination would be more

costly than the alternatives. Such a determination is clearly prohibited under the Johnson Act.

3. Certiorari is appropriate in this case.

CVEC's hyperbolic attempt to create a factual and legal foundation for the First Circuit's ruling falls on its face. Once exposed for what it is, it is clear that CVEC has no cogent argument against *certiorari* in this matter.

Simply put, the First Circuit overstepped the bounds of the Johnson Act. As noted in the Petition, the First Circuit could legitimately review the NHPUC actions to determine if those actions were in conflict with federal law or FERC order. The First Circuit had already ruled in *Patch V* that no federal law or order required CVEC to purchase under the RS-2 Contract:

> It is arguable that the Commission [NHPUC] could not disregard a long-term commitment by Connecticut Valley if FERC had blessed a contract that contained such a commitment, *cf. Mississippi Power & Light*, 487 U.S. at 373-74, 108 S.Ct. 2428; *Nantahala Power & Light*, 476 U.S. at 972, 106 S.Ct. 2349; but here the contract filed with FERC itself contains a provision allowing Connecticut Valley to extract itself on one year's notice.

Patch V, 167 F.3d at 36; Pet. App. at 48. It did not change that finding in *Patch VIII*. Rather, the First Circuit effectively overturned NHPUC's Disallowance Order, not by finding a conflict with federal law but by finding the NHPUC's rationale for the Disallowance Order had "evaporated" and that termination was "self-defeating" because it assumed that the costs of termination would be greater than not terminating. Aside from the fact that there is

no record on which the First Circuit could base that determination, such a determination is expressly reserved under the Johnson Act to the state regulatory body with jurisdiction over the utility, here the NHPUC. The Johnson Act requires that the NHPUC be free to make its determination, subject to judicial review on the record by the appropriate state courts, and not be preempted from making that determination by inappropriate federal court interference.

CONCLUSION

For all of the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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